SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

SEP 27 1971
E. ROBERT SEAVER, CLERK

No. 71-362

ELIZABETH M. PURCELL,
Respondent,

vs.

MARION STANLEY KAPELSKI,
Petitioner,

and

KATHLEEN M. LAPHAN and KATHRYN L. LAPHAN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Justices of the said Court:

Petitioners respectfully pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on May 24, 1971, petition of re-hearing of said case being denied by the United States Court of Appeals for the Third Circuit on June 30, 1971.

CITATION TO OPINIONS BELOW.

The opinion of the District Court for the District of New Jersey is unreported and is printed in Appendix A hereto, *infra* at pages 8 to 13. The opinion of the Court of Appeals for the Third Circuit has not been reported at the time of this printing. Appendix B hereto, *infra* at pages 14 to 21.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on May 24, 1971. A Petition for rehearing was denied on June 30, 1971. Jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

Whether Pennsylvania law of interspousal immunity bars a suit by a wife, Elizabeth M. Purcell (Kapelski), against her former husband, petitioner, Marion Stanley Kapelski.

Whether under the applicable conflict of rule laws the Pennsylvania law of interspousal immunity should be applied to the instant case with regard to the suit of Elizabeth M. Purcell (Kapelski), against her former husband, petitioner, Marion Stanley Kapelski.

STATEMENT.

The petitioner, Marion Stanley Kapelski, was the operator of a motor vehicle owned by his former wife, Elizabeth M. Kapelski (Purcell), and was involved in a collision with a motor vehicle owned by Kathryn L. Laphan, and operated by Kathleen M. Laphan, in Cherry Hill Township, New Jersey, on January 21, 1966. At the time of the accident, Elizabeth M. Kapelski (Purcell), and petitioner, Marion Stanley Kapelski, were married and residents of Pennsylvania. The vehicle operated by petitioner, Marion Stanley Kapelski, was registered in Pennsylvania. The Kapelskis were divorced in Pennsylvania on September 28, 1967, and Elizabeth M. Kapelski (Purcell), continues to reside in Pennsylvania.

Elizabeth M. Kapelski (Purcell), brought suit on November 8, 1967, in the United States District Court for New Jersey for personal injuries she allegedly sustained as an occupant of her vehicle, suing the Laphans as well as her former husband, Marion Stanley Kapelski. Petitioner, Marion Stanley Kapelski, filed a Motion in the District Court to dismiss the Complaint as to him on the ground that Pennsylvania law, not allowing the claim, governed. While the Motion was denied by the District Court, the Order

denying the Motion noted ". . . denying the Motion of defendant, Marion Stanley Kapelski, to dismiss the Complaint as to him, involves a controlling question of law as to which there is a substantial ground for difference of opinion . . ." (Emphasis supplied.) (Appendix C hereto, *infra* at page 23.)

The United States Court of Appeals for the Third Circuit granted petitioner, Marion Stanley Kapelski, leave to appeal on March 26, 1970, in an Order by the Honorable William H. Hastie, Chief Judge (Appendix D hereto, *infra* at page 24). Subsequent to the submission of briefs, the matter was argued orally before Circuit Judges, McLaughlin, Freedman and VanDusen on October 22, 1970. Thereafter, Judge Rosenn was assigned on April 13, 1971, to replace Judge Freedman who died on March 13, 1971. The Court, in a per curiam decision, affirmed that portion of the District Court Order denying the Motion of Petitioner, Marion Stanley Kapelski, to dismiss the Complaint as to him. (Appendix B hereto, *infra* at page 19.) It is noted that Judge McLaughlin dissented from the per curiam decision concluding that the Complaint should be dismissed as to petitioner, Marion Stanley Kapelski (Appendix B hereto, *infra* at page 21).

On June 29, 1971, the United States Court of Appeals for the Third Circuit ordered certain changes made with regard to footnote 7 of the court's majority opinion in this case. (Appendix E hereto, *infra* at page 25.) Said court denied a petition for re-hearing in this matter with both Judges McLaughlin and Gibbons dissenting from the order denying re-hearing. (Appendix F hereto, *infra* at page 26.)

REASONS FOR GRANTING WRIT.

The majority opinion of the Court of Appeals in the instant case is in conflict with the applicable and important

New Jersey law regarding conflict of laws. Rather than use the place of wrong test to determine the governing law, New Jersey courts would apply the law of the state with the paramount interest in an issue. *Mellk v. Sardhson,* 49 N. J. 226 (1967); *Mullane v. Stavola,* 101 N. J. Super. 184 (Law Div. 1968); *Pfau, et al. v. Trent Aluminum Co., et al.,* 55 N. J. 511 (1970). Thus, the appropriate procedure in choosing to apply local or foreign law is to segregate respective issues and then to view each in light of the conflicting interest of the concerned States. *Van Dyke v. Bolves,* 107 N. J. Super. 338 (App. Div. 1969).

Accordingly, to paraphrase Judge McLaughlin's observations in his dissenting opinion, the mere happenstance that a married Pennsylvania couple, the Kapelskis, became involved in an auto accident on a New Jersey road with their licensed Pennsylvania automobile near the Pennsylvania boundary line does not call for New Jersey law to govern all aspects of this case, including respondent, Elizabeth M. Purcell's (Kapelski), right to sue her husband for his alleged negligence in operating an automobile in which she was a passenger. (Appendix B hereto, *infra* at page .) Rather, it is obvious that Pennsylvania has the overwhelming relationship with regard to the marital relationship of the Kapelskis and issue of whether respondent, Elizabeth M. Purcell (Kapelski), may maintain a suit against her former husband, petitioner, Marion Stanley Kapelski.

As for Pennsylvania law, it is noted, the claim of Elizabeth M. Kapelski (Purcell), would not be allowed as to petitioner, Marion Stanley Kapelski. *Meisel v. Little,* 407 Pa. 546; *Chromy v. Chromy,* 10 D. & C. 2d 791, 20 Fay. L. J. 52 (1958); *Ellis v. Brenminger,* 71 Dist. & Co. Reports 583, 66 Montgomery Co. 183 (1950); *Smith v. Smith,* 14 Dist. & Co. Reports 466 (1930); *Swany v. Cabit,* 23 Fay. L. J. 175 (1960).

The reliance by the majority of the Court of Appeals on the recent decisions of *Immer v. Risko,* 56 N. J. 482, 267 A. 2d 481 (1970), and *France v. A. P. A. Transport Corp.,* 56

N. J. 500, 267 A. 2d 490 (1970), is misplaced. The recent New Jersey decisions of *Darrow v. Hanover Township*, N. J. 410, 278 A. 2d 200 (1971), made *France*, supra and *Immer*, supra, prospective in application only, and these decisions do not apply to the instant case. Nor do the *Immer* and *France* cases, supra, address themselves to the choice of law problem. Said problem is, of course, of paramount national concern given the increased mobility of the American public and the frequency with which individuals domiciled in one State are involved in an accident in a foreign State.

Indicative of the national approach in abandoning the place of wrong test in favor of the application of the law of the State with the paramount interest in the relationship is *Johnson v. Johnson*, 107 N. H. 30, 216 A. 2d 781 (1966), where a husband and wife, residents of Massachusetts, were involved in an automobile accident in New Hampshire, whose laws did not provide for interspousal immunity but allowed suit between spouses. Massachusetts, on the other hand, did not permit a tort action by a wife against her husband. The court denied the wife's right to sue in this case, rendering the spouses' domicile the controlling contact for choice of law purposes. Also instructive is the case of *Schwartz v. Schwartz*, 103 Ariz. 562, 447 P. 2d 254 (1968), where a husband and wife, residents of New York, were involved in an automobile accident in Arizona and the wife sued her husband as well as other defendants for injuries arising out of the accident. While Arizona law provided for interspousal immunity, in New York, a wife could maintain an action against her husband. The Arizona Supreme Court allowed the suit noting that the New York law of the domicile of the parties would apply. So too in the instant case, Pennsylvania's paramount interest in the marital relationship should be recognized. The respondent, Purcell (Kapelski), and petitioner, Kapelski, at the time of the accident were married and residents of Pennsylvania, with all that residency entails such as their automobile was registered in Pennsylvania. The fact that New Jersey was the site of the accident was merely adventitious. Respondent, Purcell

(Kapelski), and petitioner, Kapelski, were divorced in Pennsylvania and respondent, Purcell (Kapelski), continues to reside in Pennsylvania. Accordingly, Pennsylvania's paramount interest in the marital relationship should be recognized and its law of interspousal immunity should be applied. Thus, respondent, Purcell's (Kapelski), Complaint should be dismissed as to the petitioner, Kapelski.

CONCLUSION.

For the reasons and arguments in the foregoing Brief, by reason of the important question of conflict of laws and the substantial and well considered dissent of Judge McLaughlin, petitioner respectfully requests that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

BLEAKLY, STOCKWELL, ZINK & McGEARY,
By: WILLIAM S. ZINK,
Attorneys for Petitioner,
Marion Stanley Kapelski.

APPENDIX A.

ORAL ARGUMENT.

Camden, New Jersey, November 7, 1969.

Before: HON. MITCHELL H. COHEN, U. S. D. J.

APPEARANCES:

MICHAEL N. KOUVATAS, Esq., EDWARD L. WOLF, Esq., Attorneys for plaintiff;

BLEAKLY, STOCKWELL, ZINK & McGEARY, BY: SALVATORE ALESSI, Esq., Attorneys for defendant Marion Stanley Kapelski;

WALLACE, DOUGLAS, GERRY & MARIANO, BY: JOHN F. GERRY, Esq., Attorneys for defendants Laphan.

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(2) THE COURT: All right, gentlemen.

MR. ALESSI: Your Honor, this is our motion to dismiss brought by defendant Marion Stanley Kapelski.

THE COURT: Now, gentlemen, you have filed with me a half dozen briefs, you know.

MR. ALESSI: Yes, sir.

THE COURT: And I have read them. So let's not go into anything that you have already stated in your briefs. If you want to summarize it quickly, fine, but I don't need

a lengthy exposition of the cases and what they hold, and so forth. Do you understand?

MR. ALESSI: Yes, sir.

Well, Your Honor, I respectfully submit that this motion to dismiss is timely under the Federal Rules, and that Pennsylvania Law as interspousal immunity provides that a wife following a divorce cannot sue her husband for tort committed during coverture.

I have cited in my brief cases on point in Pennsylvania which so hold.

THE COURT: Where is the capacity to (3) sue determined?

MR. ALESSI: In the state in which the parties reside, Your Honor.

THE COURT: Is it the forum where the suit is instituted?

MR. ALESSI: Well, I submit that Pennsylvania—it's the forum which has the most significant interest.

THE COURT: Doesn't that go to the question of what law is to govern? If we get down to the tort phase of this, then the question of the center of gravity and contacts, and so forth and so on, is determinative or is the test used to determine what law shall apply, but when you get to a capacity to sue—and that is what we are concerned with here, are we not?

MR. ALESSI: Yes, Your Honor.

THE COURT: Well, what forum governs that question?

MR. ALESSI: I submit the Pennsylvania governs the question as to the capacity to sue of plaintiff in this case,

Your Honor, since Pennsylvania has the most significant interest (4) in the relationship of the parties. I am only speaking now, Your Honor ——

THE COURT: Well, Marion Kapelski doesn't even live in Pennsylvania any more, does he?

MR. KAPELSKI: No. But plaintiff, his former wife, resides in Pennsylvania.

THE COURT: And the accident happened in New Jersey?

MR. ALESSI: Yes, the accident happened in New Jersey. Your Honor, I have never maintained nor do I maintain now that New Jersey has no interest in this suit. In fact, I venture to say that New Jersey's laws as to traffic, traffic laws should apply to this case.

The only thing I maintain, Your Honor, as to the relationship as to the parties as to capacity to sue, Your Honor, based on the New Jersey cases that I cite, principally, Mellk versus Sarahson, for example, is that Pennsylvania should govern that relationship, since both these parties are not New Jersey residents, that they resided in Pennsylvania at the time of the accident and that the divorce of the marriage in fact (5) took place in Pennsylvania; therefore, Pennsylvania has the most significant ——

THE COURT: Where do the Laphans live?

MR. ALESSI: In New Jersey.

MR. GERRY: Both New Jersey residents, Your Honor.

THE COURT: All right.

MR. ALESSI: Well, Your Honor, I submit that Pennsylvania has the most significant interest in the relationship of the parties.

THE COURT: The marital relations have been terminated, haven't they?

MR. ALESSI: Yes. But we have a continuing public policy of Pennsylvania to bar suits, and that policy would be seriously jeopardized if this suit was allowed in this instant case.

And you look to New Jersey law as to what conflicts of laws to apply. The New Jersey cases that I cite, I believe, Your Honor, are dispositive on the point as to what forum should apply as to the matter of relationship.

Since the pole star of the cases that I (6) cite, and I am referring specifically to Mellk versus Sarahson, Stacy versus Greenberg, that the pole star of these cases, Your Honor, is that the state, the forum with the most significant relationship of the parties, that that forum's laws as to that relationship should govern, Your Honor. I submit, Your Honor, that Pennsylvania has the most significant interest in the marital relationship of the capacities and that forum's laws as to interspousal immunity barring the present suit should be applied.

THE COURT: All right. Which one of you gentlemen wants to argue first?

MR. GERRY: Your Honor please, thanks to counsel and Your Honor, I would like to respond, if I may.

I know the issues are very narrow in which the Court remains interested, and the Court I think has directed us to in these last series of briefs as to simply the issue of what law applies. It was interesting to hear counsel moments ago, as I understand him, acknowledge the fact that the issue here is one of capacity to (7) sue; in this particular instance, the capacity of the plaintiff wife to sue her defendant husband.

It was my understanding that it was also his opinion that this was one of the issues that the forum state's own law determines the capacity to sue.

If I may, Your Honor, refer to one of the three New Jersey cases upon which the moving party here relies for the deviation from the general rule to apply a foreign state's law; namely, the Koplict case, where the Court at one point says, and I quote it in the brief, that the laws of the forum state, "which in the opinion of the Court in the Koplict case '. . . determines the jurisdiction of the courts, the capacity of the parties to sue or to be sued, the remedies which are available to suitors and the procedure of the Courts . . .' ".

THE COURT: I don't think there is any question about that.

MR. GERRY: If Your Honor please, I don't believe, as I have pointed out in my brief, I don't believe that the three cases mentioned, the Koplict case and the other case and the Stacy versus (8) Greenberg case, I don't think they say any such thing. I think each one of those cases, for the reasons I have set forth in some detail in the briefs and argued, do not say that the New Jersey Courts in an instance like this would go out where the New Jersey Court is the forum court and also the lex loci delicti state that they would go out and ignore their own laws in order to apply foreign law under these circumstances, with the net result, among others, of immunizing from liability a defendant who has already been found by its own court to be solely negligent and responsible for this accident.

THE COURT: Gentlemen, I don't require any further argument. I think your position, Mr. Gerry, is sound. I don't find much support in the theory that you have advanced, Mr. Alessi. However, you are to be commended for your resourcefulness and the efforts that you have displayed in submitting the matter to me on various briefs.

Your motion to dismiss the complaint will be denied.

Also, I think each of you have made (9) motions for partial summary judgment in view of the fact that this issue of negligence has been litigated and set to rest in the State Court proceeding.

It was the same accident, it was a passenger against both drivers, was it not?

MR. GERRY: That's right.

THE COURT: And in my view, it is res adjudicata.

You may submit the necessary orders.

APPENDIX B.

OPINION OF THE COURT.

(Filed May 24, 1971.)

PER CURIAM:

The question presented by this diversity action for personal injuries arising out of the collision of two automobiles is whether a wife who has obtained a divorce after the accident may sue her former husband for the tort.

The accident occurred on January 21, 1966, in Cherry Hill Township, New Jersey, when an automobile driven by Marion Stanley Kapelski, in which his wife, Elizabeth M. Kapelski, was a passenger, collided with a car driven by Kathleen M. Laphan, in which her sister, Kathryn L. Laphan, was a passenger. At the time Mr. and Mrs. Kapelski were citizens of Pennsylvania. They were divorced on September 28, 1967. On November 8, 1967, Mrs. Kapelski instituted this action in the United States District Court for the District of New Jersey against her former husband, who had in the meantime become a citizen of California, and the Laphan sisters, who were citizens of New Jersey. On April 3, 1969, a year-and-a-half after the suit was begun, plaintiff remarried and is now known as Elizabeth M. Purcell.

Plaintiff claimed that her former husband and Kathleen M. Laphan were negligent and that Kathryn L. Laphan was liable for Kathleen's negligence under the principle of respondeat superior. The Laphan sisters cross-claimed for contribution from Mr. Kapelski and he cross-claimed for contribution from them.

On motion for summary judgment the district court held that a prior New Jersey state court judgment obtained by a passenger in the Kapelski car, who had been injured in the same accident,[1] had adjudicated that Mr. Kapelski

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[1] Mary Raubert v. Marion Stanley Kapelski, Elizabeth M. Kapelski, Kathleen Laphan and Kathryn Laphan, Superior Court of New Jersey, Law Division, Camden County, Docket No. L-9655-66.

was negligent and the Laphan sisters were free of negligence. The district court therefore granted the motion of the Laphan sisters to dismiss Mr. Kapelski's cross-claim. For the same reason it held that Mr. Kapelski's negligence rendered him liable to Mrs. Kapelski (Purcell) and therefore granted summary judgment in her favor, adjudging Mr. Kapelski's liability but leaving Mrs. Kapelski's (Purcell's) damages to be assessed. The district court also denied Mr. Kapelski's motion to dismiss the plaintiff's action as barred by spousal immunity, and certified under 28 U. S. C. §1292(b) that the order denying such motion involved a controlling question of law as to which there was substantial ground for difference of opinion and that an immediate appeal from the order might materially advance the ultimate termination of the litigation. We then entered an order under Rule 5 of the Federal Rules of Appellate Procedure granting Mr. Kapelski leave to appeal.

In this diversity action the district court sitting in New Jersey was required to apply the law which the New Jersey state courts would apply. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U. S. 487 (1941).

The problem posed is, therefore, the determination of which state's law New Jersey would apply in these circumstances and a construction of that applicable law.

Inter-spousal immunity in New Jersey was entwined in the related sources of the common law and early statutes.[2] The immunity was read as a prohibition embedded within the fabric of the common law and hence subject to the capacity for development and change characteristic of the common law.[3] There came about a gradual loosening of this hybrid common-law-statutory restriction, and the right to sue was recognized in an expanded area. In 1961

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[2] N. J. S. A. 37:2-5 provides:

"Nothing in this chapter contained shall enable a husband or wife to contract with or sue each other, except as heretofore, and except as authorized by this chapter."

[3] **See Long v. Landy**, 35 N. J. 44, 171 A. 2d 1, 4 (1961); **Kennedy v. Camp**, 14 N. J. 390, 102 A. 2d 595 (1954).

the Supreme Court of New Jersey held that the disability only immunizes the spouse from suit and the immunity therefore ends with a spouse's death, and that accordingly a widow could maintain a suit against her deceased husband's estate for his negligence committed during coverture.[4] Later, in 1967, the New Jersey courts held that they would "accept the finality of termination of the marriage by divorce as being equivalent as determined by death," and that in "every case, termination of marriage removes the interdiction against inter-spousal litigation."[5]

This gradually unfolding expansion of the right to sue has culminated in *Immer v. Risko*, 56 N. J. 482, 267 A. 2d 481 (1970), in which the court substantially overruled *Koplik v. C. P. Trucking Corp.*, 27 N. J. 1, 141 A. 2d 34 (1958), and held that the marriage of a plaintiff and defendant did not bar the maintenance of the suit already pending between them for a tort committed prior to the marriage. The facts in *Immer*, of course, differ from those of the present case. But there, and in the companion case of *France v. A. P. A. Transport Corp.*, 56 N. J. 500, 267 A. 2d 490 (1970), which dealt with the common law immunity of parent and child from suits against each other, the Supreme Court of New Jersey undertook to declare the law of the future in that state in regard to automobile torts involving inter-spousal and parent-child immunity on the basis of its public policy. The *Immer* court was not content with the prior limited exceptions on immunity which had been created by the New Jersey decisions where the circumstances were such that the relationship giving rise to the immunity no longer existed, as in the case of the death of a spouse or child. Going beyond the facts of the case before it, the court announced that in all automobile negligence actions inter-spousal immunity no longer

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[4] **Long v. Landy**, 35 N. J. 44, 171 A. 2d 1 (1961), approving **Johnson v. Peoples First National Bank and Trust Company**, 394 Pa. 116, 145 A. 2d 716 (1958).

[5] **Sanchez v. Olivarez**, 94 N. J. Super. 61, 226 A. 2d 752 (1967).

existed. The court reasoned that automobile liability insurance made it artificial to maintain inter-spousal immunity on the theory of disruption of the domestic felicity, and that the other justification advanced in more recent times, that the rule was required to protect insurance carriers against fraud and collusion, would not withstand New Jersey's successful experience in permitting actions by guests against their hosts, an area where equal danger of collusion existed.[6]

After carefully considering the history of the rationale underlying inter-spousal immunity, and its gradual erosion in the New Jersey courts, the highest court of New Jersey made it clear that as a matter of public policy it would not permit one who has been injured by the negligence of another in the operation of an automobile to be barred from obtaining redress on the ground that, when recovery in tort is sought, the parties are married or had been previously married.

As noted above, prior to *Immer* and *France*, the New Jersey courts in *Sanchez v. Olivarez*, 94 N. J. Super. 61, 266 A. 2d 752 (1967), had recognized the right of spouses to sue each other after divorce, which is the situation

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[6] The court in **Immer** stated that:

". . . we do not believe that the possibility of fraud should any longer be deemed sufficient to bar all interspousal tort claims without at least an opportunity to determine whether our courts can deal adequately with the problem. And the experience of other states which have abandoned the immunity (see Balts v. Balts, 273 Minn. 419, 430, 142 N. W. 2d 66, 73 (1966)) and of our own state with the host-guest relationship tends to indicate that the problems can be dealt with. It is, after all, the business of our courts to deal with such problems and we ought not assume the task is too onerous without some basis in experience for the assumption. If for some unexpected reason our faith in the ability of judges and juries to weed out fraudulent claims in particular cases proves wrong, our courts are free to re-adopt the immunity doctrine. That is the nature of the common law. Or the Legislature may act. But we ought not continue to maintain a doctrine for fear of an unhappy consequence when what knowledge we have tells us that our fears may not be justified." 56 N. J. at 493-94, 267 A. 2d at 487.

presented by this record. That decision would go far in establishing the law of New Jersey that would govern in this case, assuming that New Jersey state courts would apply New Jersey law. But *Immer* and *France* represent far more fundamental changes in the view of the New Jersey courts toward inter-spousal immunity, and reveal far more clearly than *Sanchez* the public policy of New Jersey in this area. The broad scope of the new rules announced in *Immer* and *France* also reflects the strength of the New Jersey public policy in this area, which strength indicates that the New Jersey courts would be likely to apply this policy to any actions brought in the courts of that state in situations similar to those presented by this record.

We need not, however, rest our conclusion exclusively on our view of the strength of the New Jersey policy, and our resulting view that the New Jersey courts would likely apply their own policy in an action brought in New Jersey by foreign domiciliaries, for New Jersey has a variety of other interests at stake in cases like this. New Jersey has an interest as the situs of the accident in whatever restraining effect upon potentially negligent drivers it may attribute to an unrestricted right of action by persons injured, even though they be spouses, by the negligence of others on New Jersey's highways. Also, New Jersey has an interest in protecting any New Jersey doctors and hospitals who may have extended treatment to the plaintiff following the accident, and who may have to look to plaintiff's recovery for their remuneration. In addition, had the Laphan sisters not already been adjudicated free from negligence, New Jersey would have an interest in protecting their right of contribution, since they are its citizens, a right which would be jeopardized if the defendand spouse's motion to dismiss the main action were granted.

We believe that a New Jersey state court would apply the law of New Jersey in this case on the facts in this record.[7]

For the foregoing reasons, we will affirm that part of the February 26, 1970, district court order, filed March 3, 1970, denying the motion of defendant, Marion Stanley Kapelski, to dismiss the complaint as to him.[8]

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[7] We emphasize that this record presents an unusual set of facts. In **Koplik v. C. P. Trucking Corp.**, 27 N. J. 1, 141 A. 2d 34 (1958), the Supreme Court of New Jersey followed the lead of **Emery v. Emery**, 45 Cal. 2d 421, 289 P. 2d 218 (1955), and adopted the rule that "disabilities to sue and immunities from suit arising from the family relationship [will be] determined by reference to the law of the state of the family domicile when the suit is brought . . ." 27 N. J. at 11-12, 141 A. 2d at 40. This part of **Koplik** appears to have survived the decisions in **Immer v. Risko**, 56 N. J. 482, 267 A. 2d 481 (1970), and **France v. A. P. A. Transport Corp.**, 56 N. J. 500, 267 A. 2d 490 (1970). We do not, however, believe that this rule is applicable to the facts of this case. First, at the time this suit was brought, there existed no "family relationship" which would call for application of the rule. Second, at the time this suit was brought Mrs. Kapelski (Purcell) was domiciled in Pennsylvania, and Mr. Kapelski was domiciled in California. There are, therefore, different domiciles with different rules, assuming Pennsylvania retains inter-spousal immunity, since California has abandoned the doctrine of inter-spousal immunity. **See Klein v. Klein**, 58 Cal. 2d 692, 26 Cal. Reptr. 102, 376 P. 2d 70 (1962). Thus the **Emery-Koplik** rule, which is designed to further the policies and interests of domiciliary states, is inapplicable to the facts presented by this record. **Compare** the proposed draft of Restatement (Second) of Conflicts of Laws §§169, 145 (Proposed Official Draft, Part II, 1968) **and** Restatement (Second) of Conflicts of Laws §§169, 145 (1971) **with** the proposed draft of Restatement (Second) of Conflicts of Laws §390g & comment b & illustration 6, §379 (Tent. Draft No. 9, 1964).

[8] The district court order provides in part, in accordance with 28 U. S. C. §1292(b),

> "That part of this Order denying the motion of defendant, Marion Stanley Kapelski, to dismiss the complaint as to him, involves a controlling question of law as to which there is a substantial ground for difference of opinion and an immediate appeal from that part of this Order may materially advance the ultimate termination of the litigation."

and it is that part of such order which is challenged by this appeal.

McLAUGHLIN, *Circuit Judge*, dissenting.

This appeal arises out of a collision between two automobiles on January 21, 1966 at the intersection of Munn Avenue and Kings Highway, East, Cherry Hill Township, Camden County, New Jersey. Plaintiff-Appellee was the owner of one of the automobiles in which she was riding at the time. Her then husband, defendant-appellant Kapelski, was operating the car. Plaintiff, now Mrs. Purcell, in her complaint alleges that at the time and place of the accident she was a passenger in her automobile which her husband was driving. She claims that the collision was caused by reason of the negligence of her husband and the driver of the other machine. She asserts that she suffered serious personal injury from the said collision. In his answer defendant Kapelski alleges that plaintiff was guilty of negligence and contributory negligence. He denies each and every affirmative allegation of the complaint which would include the allegation that plaintiff was a passenger in her automobile at the time of the accident. In a separate defense the answer states that plaintiff's alleged injuries and/or damages were caused by the sole negligence of the owner and driver of the other automobile involved.

Appellant Kapelski filed a motion in the district court to dismiss the complaint against him on the ground that Pennsylvania law governed as to whether plaintiff had the right to sue the person who was her husband at the time of said accident on the theory that it was his negligence which caused her injury. The motion was denied by the district court. That decision is the sole basis of the appeal here which is on behalf of defendant-appellant Kapelski. The latter and plaintiff-appellee, the now Mrs. Purcell, when the accident occurred were husband and wife and domiciled in the Commonwealth of Pennsylvania. They were later divorced. The wife remarried and continued to reside in Pennsylvania; defendant-appellant became a California resident.

It is not disputed that at the time of the accident, the Kapelski automobile was a Pennsylvania licensed car with

its Pennsylvania owner and her husband, a citizen of Pennsylvania, therein. Under the law of that state then and now such a hard nosed claim as is presented on this appeal would not be allowed, *Meisel v. Little,* 407 Pa. 546. *Chromy v. Chromy,* 10 D. & C. 2d 791, 20 Fay. L. J. 52 (1958); *Ellis v. Brenninger,* 71 Dist. & Co. Reports 583, 66 Montgomery Co. 183 (1950); *Smith v. Smith,* 14 Dist. & Co. Reports 466 (1930); *Swaney v. Cabit,* 23 Fay. L. J. 175 (1960).

The happenstance that the Pennsylvania couple in their Pennsylvania machine became involved in a two-car collision at a New Jersey roads intersection near the Pennsylvania line does not automatically call for New Jersey law to not only govern that state's various rules of the road but also whether this plaintiff under the facts has the right to sue her husband for his claimed negligence in driving her automobile in which she was riding. *Melik v. Sarahson,* 49 N. J. L. 226 (1967), a late and the leading New Jersey Supreme Court decision on this type of litigation strongly ruled that in such factual problem the law of the place is not ". . . to be applied mechanically but that courts should give attention to other factors which are relevant to the choice of the law process" (p. 229). I think it obvious that Pennsylvania in this instance has the overwhelming relationship with the Pennsylvania parties to the accident, particularly with regard to their then marital status. I must conclude that the part of the district court order denying appellant's motion to dismiss the complaint as to him should be reversed and appellant's motion to dismiss the complaint as to him allowed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX C.

ORDER.

On November 7, 1969 in open Court before the undersigned, a Motion was made by counsel for the defendants, Kathleen M. Laphan and Kathryn L. Laphan, for a partial summary judgment, or in the alternative for a dismissal in their favor and against the defendant, Marion S. Kapelski, on his crossclaim against them for contribution under the joint tortfeasor contribution act. A motion was made by counsel for the defendant, Marion Stanley Kapelski, to dismiss the Complaint of plaintiff Elizabeth M. Kapelski, as against said defendant. Further, a motion was made by counsel for plaintiff, Elizabeth M. Kapelski, for an Order pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting a summary judgment in favor of the plaintiff and against defendant, Marion Stanley Kapelski, upon the issue of negligence. Upon full consideration of argument of all counsel and considering further the facts and the applicable law:

IT IS on this 26th day of February, 1970, ORDERED that the partial summary judgment be and it is hereby entered in favor of the defendants, Kathleen M. Laphan and Kathryn L. Laphan, against the crossclaim of defendant, Marion Stanley Kapelski.

IT IS FURTHER ORDERED that the motion of defendant, Marion Stanley Kapelski, to dismiss the Complaint as to him be and it is hereby denied.

IT IS FURTHER ORDERED that the motion for summary judgment on behalf of plaintiff, Elizabeth M. Kapelski, against the defendant, Marion Stanley Kapelski, on the issue of his negligence is hereby granted.

That part of this Order denying the motion of defendant, Marion Stanley Kapelski, to dismiss the complaint as to him, involves a controlling question of law as to which there is a substantial ground for difference of opinion and an immediate appeal from that part of this Order may materially advance the ultimate termination of the litigation.

IT IS FURTHER ORDERED that all proceedings in this Court are stayed.

/s/ MITCHELL H. COHEN,
District Judge.

On Motion of
BLEAKLY, STOCKWELL, ZINK
& McGEARY,
Attorneys for Defendant Marion Kapelski.

We consent as to the form of the within Order.

/s/ MICHAEL N. KOUVATAS,
Attorney for Plaintiff.

WALLACE, DOUGLAS, GERRY
& MARIANO,
Attorneys for Defendants, Laphan,
By: /s/ JOHN F. GERRY.

APPENDIX D.

ORDER.

Upon consideration of petition for leave to appeal pursuant to 28 U. S. C. Sec. 1292(b), in the above-entitled case,

It is ORDERED that petitioner be and hereby is granted leave to appeal, in accordance with the provisions of 28 U. S. C. §1292(b), from the interlocutory order of the United States District Court for the District of New Jersey, entered February 26, 1970, in C. A. No. 1149-67. See the provisions of Rule 5(d), Federal Rules of Appellate Procedure.

By the Court,
WILLIAM H. HASTIE,
Chief Judge.

Dated: March 26, 1970.

APPENDIX E.

ORDER.

AND NOW, June 29, 1971, it is ORDERED that the following changes are made in footnote 7 on page 7 of the May 24, 1971, slip opinion in the above matter*:

1. The second sentence of such footnote 7 is revised to read as follows:

> In *Koplik v. C. P. Trucking Corp.*, 27 N. L. 1, 141 A. 2d 34 (1958), the Supreme Court of New Jersey followed the lead of *Emery v. Emery*, 45 Cal. 2d 421, 289 P. 2d 218 (1955), and adopted the rule that "disabilities to sue and immunities from suit arising from the family relationship [will be] determined by reference to the law of the state of the family domicile when the suit is brought in that state."

2. The fourth sentence of such footnote 7 is revised to read as follows:

> Assuming that the New Jersey courts would apply this rule to suits brought in New Jersey when New Jersey is not the domiciliary state, we do not believe that this rule is applicable to the facts of this case.

BY THE COURT:—

/s/ FRANCIS L. VAN DUSEN,
Circuit Judge.

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* The majority has not overlooked the decision of the Supreme Court of New Jersey in **Darrow v. Hanover Township**, No. A-104 (N. J., filed June 7, 1971). The majority does not believe that **Darrow's** reasoning applies to the facts of this case. The paramount New Jersey authority relied upon in this case for a determination of the applicable New Jersey law of interspousal disabilities to sue is **Sanchez v. Olivarez**, 94 N. J. Super. 61, 226 A. 2d 752 (1967). Unlike the court in **Immer v. Risko**, 56 N. J. 482, 267 A. 2d 481 (1970), the **Sanchez** court did not purport to make a significant change in the common law of New Jersey. Although the decision in **Sanchez** may be at variance with English common law, the **Sanchez** court merely purported to apply to a new factual situation the existing common law of New Jersey, common law which was already showing a departure from older English common law. See **Sanchez**, 226 A. 2d at 754.

Judge McLaughlin dissents from the above majority view of the New Jersey **Darrow** case in which the opinion was filed June 7, 1971.

APPENDIX F.

SUR PETITION FOR REHEARING.

Present: SEITZ, Chief Judge, and McLAUGHLIN, VAN DUSEN, ALDISERT, ADAMS, GIBBONS and ROSENN, Circuit Judges.

The petition for rehearing filed by Marion Stanley Kapelski, Appellant, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judges McLaughlin and Gibbons dissent from this order.

By the Court,

/s/ FRANCIS L. VAN DUSEN,
Judge.

Dated: June 30, 1971.